UNTIED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

TEAMSTERS LOCAL 624, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHANGE TO WIN COALITION, Charging Party, vs. NEILMED PRODUCTS, INC., Respondent.	CASE NO.: 20-CA-35363

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

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STATEMENT OF THE CASE

This is a case of first impression and presents the question of how the NLRB should balance two competing interests: a union's right to choose their designated agent to access the Employer's facility and the Employer's duty to provide a safe workplace free of intimidation and fear. This is not a refusal to bargain with the Union's designated agent, as the ALJ analyzed it, but a refusal to provide plant access to the Union's designated agent due to the Employer's statutory duty to provide a safe work place. This case is founded in an unusual situation wherein a picketing employee's violent and intimidating behavior both on and off the picket line has caused fear among employees, and the Union, with full knowledge of that fear, insists that individual be permitted unfettered access to these very same employees. Based on these extenuating circumstances, the employer's duty to provide a safe workplace, free from fear and intimidation, requires that Respondent exclude the agent from the premises and the employees who are intimidated by and fearful of him.

II

STATEMENT OF FACTS

A. The Parties and the Bargaining History

Respondent is a pharmaceutical company that manufactures sinus rinse and irrigation for the nose. In August of 2009, after a duly held election, the Teamsters Union Local 624 was certified as the exclusive bargaining representative of approximately 120 employees of Respondent, NeilMed Products, Inc. After months of negotiations, on May 21, 2010, the bargaining unit employees began picketing outside the NeilMed facility at 601 Aviation Blvd., Santa Rosa, California.

B. June 16, 2009 Picket Line Incident

On June 16, 2010 Respondent Elmer Cisneros, a picketer and employee of Respondent, initiated a violent encounter with Jonathan Herdita, a temporary employee of NeilMed, who was attempting to drive his vehicle across the picket line. This incident led to Respondent seeking a Workplace Restraining Order against Mr. Cisneros, and his eventual termination from employment on August 2, 2010.

The incident and subsequent agreement by Mr. Cisneros to pay for Mr. Herdita's windshield are memorialized in the Sonoma County Sheriff Department's "Calls for Service Reports." (Respondent's Exhibits 1 and 2.) There had also been a prior incident wherein Mr. Cisneros jumped in front of a vehicle and claimed he had been hit by the vehicle. (Respondent's Exhibit 3.)

On June 16, 2010, in the presence of Sonoma County Sheriff Deputy Shanahan, Mr. Cisneros agreed to pay for Mr. Herdita's windshield as memorialized in a note signed by both Mr. Cisneros and Mr. Herdita (GC Exhibit 4) and the Call Report authored by Sonoma County Sheriff's Deputy Michael Shanahan (Respondent's Exhibit 1). Mr. Cisneros admitted in his testimony that he agreed to pay for the windshield and memorialized that agreement with a signed note. (GC Exhibit 4) The note does not reflect any other conditions of payment or indicate that Mr. Herdita and Mr. Cisneros had made other conditions related to the payment of the price of the windshield. The report authored by Deputy Shanahan also indicates that Mr. Cisneros agreed to pay for the windshield without additional conditions. However, Mr. Cisneros now claims that there was an additional verbal agreement that the written agreement would only be followed if Mr. Herdita did not press criminal charges, and that Mr. Herdita violated this "verbal" agreement when he obtained a TRO against Mr. Cisneros. When testifying, Mr. Cisneros did admit that he was given the option to pay for the window or be arrested.

C. Conduct of the Parties after the Picket Line Incident

On July 19, 2010, the parties entered into a settlement agreement where striking employees desiring to return to work would receive amnesty. Mr. Cisneros was specifically excluded from this agreement. (Respondent's Exhibit #6) On August 2, 2010, following employer's investigation of Mr. Cisneros' conduct on the picket line, a notice of termination was provided to the Charging Party. (GC Exhibit 2) Mr. Cisneros testified that he received notice that he was terminated the following day, just before a negotiating session at the Teamsters office. (Tr. 37:15) The negotiating session included Mr. Cisneros, Carmen Capucetti, Marta Almeida, and Ralph Miranda on behalf of the union and Mark Jordan, Diane Aqui, and Carolyn Ryzanych for Respondent. Further negotiating sessions included Diane Aqui and Carolyn Ryzanych but never included Neilmed employees who were fearful of Mr. Cisneros.

On numerous occasions after Mr. Cisneros' termination, the Union requested that NeilMed reinstate Mr. Cisneros. NeilMed continuously refused, citing Mr. Cisneros's intimidating and assaultive behavior and workplace safety. (Tr. 141:20-25, 142:1-19).

On December 10, 2010, Mr. Cisneros accompanied Ralph Miranda to the Neilmed location. At that time, Mr. Cisneros was advised that he could not be on company property "because of the TROs, and some employees were fearful of him." (Tr. 40:24-41:2) Mr. Miranda advised Respondent's counsel that he and Mr. Cisneros would be visiting the Neilmed premises on the following day for a grievance investigation and to answer some employee questions. (GC Exhibit 9) At no time was there any testimony or documentary evidence that Mr. Cisneros' presence at the facility was required in order to investigate the grievance or answer employee questions. Mr. Cisneros could have performed those tasks at any other location.

A similar occurrence happened on December 27, 2010 when Mr. Cisneros accompanied Mr. Miranda for a negotiating session at the Neilmed facility. Mr. Cisneros was asked to leave the premises. (Tr. 42:2) Mr. Cisneros has not been allowed on the premises in any way for any purpose.

D. Testimony and Transcript Records regarding the Sequestration and Photos

Prior to the presentation of witnesses, the ALJ inquired about a sequestration motion. Attorney for Respondent requested that Mr. Cisneros not be present while the witnesses for Respondent were testifying. The record reflects that this concern had been previously offered during the conference call prior to the trial. After hearing the concerns expressed by Attorney for Respondent, specifically that Respondent's witnesses had expressed concern that Mr. Cisneros would know they were testifying against him and their fear as to retaliation from him, the ALJ merely required that the formulaic sequestration motion be made, and she then granted the motion.

Later, off the record and following a break, Respondent's counsel revisited this issue of the witnesses' fear of Mr. Cisneros with the court, and reported a specific incident which had just occurred. (Tr. 61:16) Counsel told the court that when Respondent's six female witnesses arrived for the hearing, Mr. Cisneros took out his cell phone and photographed the witnesses. <u>This was exactly the type of intimidating behavior that counsel had sought to prevent with the sequestration request</u>.

The ALJ did not find a violation of the sequestration order based upon her conclusion that "a sequestration rule is to ensure reliability of testimony so that witnesses do not talk with each other."

Respondent's witness Maria Chavez later testified that when she and Respondent's other

witnesses entered the building, Mr. Cisneros took pictures of them with his cell phone. This testimony, despite Charging Party's objection, was allowed to remain on the record, but the ALJ indicated that she didn't put much emphasis on it because it "doesn't go to the action of prohibiting Mr. Cisneros from coming to the facility."

E. Testimony of Respondent's Employee Witnesses Regarding their Fear of Mr. Cisneros

Employee Maria Chavez testified that she was afraid of Mr. Cisneros. Further, she testified that Mr. Cisneros hit her car with his picket sign on at least three occasions, stopped in front of her car in order to force her to stop, and that Mr. Cisneros shouted obscenities at her. Ms. Chavez testified that Mr. Cisneros said that if she "wasn't with them, something bad would happen to her (sic)," and she clarified that Mr. Cisneros threatened her with something bad happening to her. (Tr. 147, 148)

Ms. Chavez complained to her employer regarding Mr. Cisneros actions and under the California Workplace Safety statutes sought a temporary restraining order against Mr. Cisneros. She called the police and reported that Mr. Cisneros was hitting her car and "saying things to her." Mr. Cisneros hit her car "a lot" and blocked Ms. Chavez' egress. (Tr. 152, 153) Ms. Chavez even testified that she had seen Mr. Cisneros after his termination when he would come to the company although she hadn't had any direct contact with him. She remained fearful of Mr. Cisneros.

Another employee, Marilu Chavez testified that while she was on strike and picketing with Mr. Cisneros for about a week, Mr. Cisneros would tell the picketers to obstruct the cars and not let them go by. Ms. Marilu Chavez didn't like the picketing because she felt that she and the other picketers were being too aggressive with the people who went by. Ms. Marilu Chavez told two Neilmed employees that Mr. Cisneros had yelled at her, and she expressed her fear of Mr. Cisneros

to the employees.

Teresa Medrano, another Neilmed employee, testified that in addition to hurling insults as she crossed the picket line, Mr. Cisneros used his elbow to turn her rearview mirror as she passed. Mr. Cisneros also put himself in front of her car, obstructing her egress, so she couldn't move. Ms. Medrano testified that she was afraid of Mr. Cisneros.

Maria Mendoza, another Neilmed employee, also testified that Mr. Cisneros would impede her vehicle's movement through the picket line. Maria Serrano, another Neilmed employee also testified. (Tr. 181) She explained that Mr. Cisneros would yell obscenities at her and jump in front of her truck. Mr. Cisneros jumped in front of her truck on at least three or four occasions. She also notified Respondent via Carolina (former HR Director of Respondent) and human resources that she was fearful of Mr. Cisneros.

Viviana Ruano, Human Resources Assistant, testified that during the strike, employees would come to her office and tell her that they were scared for their safety and that this fear was based mainly on Elmer Cisneros. (Tr. 187) Ms. Ruana testified that the employer did not want Elmer Cisneros on the premises because of employee safety.

F. The Lack of Unique Knowledge or Skills Possessed by Mr. Cisneros

Mr. Cisneros last worked at the Neilmed facility on May 19, 2010. He worked at the warehouse. (Tr. 88:12-19) Mr. Cisneros never worked with updated and new specialized machinery purchased by Respondent after May 19, 2010 such as the Marcherani machine or the Bosch machine. Respondent's counsel made an offer of proof to elicit testimony that Mr. Cisneros has no knowledge of the new safety programs or manufacturing machinery that gives him specialized knowledge justifying Mr. Cisneros be the chosen representative over any other Union Business

Agent. This offer of proof was rejected by the ALJ. (Tr. 92)

G. The Union Acted in Bad Faith in Demanding that Mr. Cisneros be their Appointed Business Agent for Purposes of Accessing the Employer's Facility

After the picket line incident, and while Mr. Cisneros was on suspension, the parties entered into a July 19, 2010 settlement agreement whereby some striking employees desiring to return to work would receive amnesty. Mr. Cisneros was specifically excluded from this agreement. (Respondent's Exhibit #6).

On numerous occasions after Mr. Cisneros' termination, the Union requested that NeilMed reinstate Mr. Cisneros. NeilMed continuously refused, citing Mr. Cisneros' intimidating and assaultive behavior and workplace safety. (Tr. 141:20-25, 142:1-19).

Despite this knowledge of Respondent's psoition that Mr. Csineros would not be permitted back to NeilMed's facility, the union appointed him business agent on December 15, 2010. (Tr. 39) From that date forward, despite knowledge that employees were fearful of Mr. Cisneros, the union attempted to bring him onto the premises.

III

LEGAL ARGUMENT

A. This is a "Refusal of Access" Case, not a "Refusal to Bargain" Case

Exception 1: Charged party excepts to the ALJ's finding that the issue of whether Mr. Cisneros' presence created ill will and made good-faith bargaining impossible subsumes the issue of the Employer's duty under California State law to provide a safe work place for their employees, and consequently excepts to her "Refusal to Bargain" analysis rather than "Refusal of Access" analysis.

There is ample Board authority that "preoccupation" with a concern that an individual would act violently "undermines good-faith collective bargaining because it impedes a vigorous exchange of positions unencumbered by the threat of an adversary's violent reaction." See *King Soopers*, 338 NLRB 30 (2002). However, this authority addresses only the factual circumstances where violence is directed towards management, decision makers and members of the negotiating committee, i.e., not towards bargaining unit employees. Clearly, if management is fearful of the union's business agent, it would be impossible to negotiate in good faith.

Clearly also is the answer to the question of whether a bargaining unit employee's fear of a union's business agent precludes good faith bargaining. The answer is obviously in the negative. Why would it? Unless on the negotiating committee, the bargaining unit employee has no decision making authority or input into the negotiations other than voting on a contract, and their fear of the agent is immaterial. It is only material when the agent has access to the employee at the work place.

Respondent requests that the Board analyze this issue in the context of the bargaining unit employees' feelings and beliefs, and not that of management.

When this is done, the issue in this case becomes not one of good faith bargaining, but whether workplace safety justified refusing access to Mr. Cisneros. To state, as the ALJ did, that the workplace safety issue is subsumed within the determination of whether good faith bargaining can take place ignores the feelings of the bargaining unit employees, for whom the labor laws were developed, and considers only the perspective of management.

The ALJ erred when analyzing the issue under *King Soopers* 338 NLRB 30 (2002), *Fitzsimmons Manufacturing Company* 251 NLRB 375 (1980) and related cases. This is not a "Refusal to Bargain" case. It is a "Refusal to Provide Access" case and is more properly analyzed

under the authority of *Turtle Bay Resort* 353 NLRB No. 127, 1242 (1990).

In *Turtle Bay Resort*, the Employer denied access to parts of their facility to the Union's business agent, and the ALJ stated the following:

"However, the present issue is not whether, in a vacuum, the Respondent could lawfully deny access to a union representative. In the present case, there is a preexisting agreement that authorizes union access to the Turtle Bay Resort. Accordingly, the question is whether the Respondents may lawfully and unilaterally restrict union access to Turtle Bay in derogation of the agreement." *Supra,* pg. 1275.

That is the identical situation here. The Collective Bargaining Agreement, executed by Respondent and the Union on November 19, 2010 states the following:

> "8. Inspection Privileges
> Authorized agents of the Union shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating work conditions, collection of dues and ascertaining that the Agreement is being adhered to, provided however, that there is no interruption of the Employer's work schedule, and management is notified of the Union's presence in the Plant."

Therefore, in light of this preexisting agreement, the real question is whether Respondent NeilMed could "lawfully and unilaterally" restrict union access to their facility by prohibiting Mr. Cisneros entry.

There is no argument that "union access to the employer's premises is a mandatory subject of bargaining , which requires notice to the union and an opportunity to bargain prior to any change." *American Commercial Lines*, 291 NLRB 1066, 1072 (1988).

Further, there is no argument that "an employer violates Sections 8(a)(5) and (1) of the Act by unilaterally and without notice making a material, substantial, and significant change in a

contractual access provision." *Fabric Warehouse* 294 NLRB 189 (1989), and "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison* 284 NLRB 1205, fn 1 (1987).

Respondent and the Union did agree on the access provision clause, and subsequently executed the agreement on November 19, 2010. At that time, Elmer Cisneros had already been terminated for at least 3 months, and had not yet been hired by the Union as their business agent. Around that time, the union had repeatedly requested that Respondent reinstate Mr. Cisneros, but NeilMed continuously refused, citing the picket line incident and that employees were fearful of him. Based on this, the Union was aware that Respondent would not allow Mr. Cisneros access to their employees, therefore, when Respondent ultimately did refuse Mr. Cisneros access in mid-December, it was not "without notice."

Nor was the refusal a "material, substantial, and significant change" from the access provision in the collective bargaining agreement. At the time the contract was executed, NeilMed did not contemplate that Mr. Cisneros would ever be an "authorized agent of the union". The only "change" to the access provision was done by the Union when they attempted to have Mr. Cisneros enter the facility despite knowing that Respondent had sought Workplace Safety Restraining Orders against Mr. Cisneros and knowing that Respondent would not permit Mr. Cisneros access due to employees' fear of him and his intimidating tactics.

In answer to the question of whether Respondent could "lawfully and unilaterally" restrict union access to their facility by prohibiting Mr. Cisneros entry despite the contractual provision, the Board must necessarily look at the reasons why the Respondent denied access, which was solely due to workplace safety.

Because the ALJ analyzed the issue in the context of good faith bargaining, which as stated above, examines the decision maker's perspective, and not the bargaining unit employees' perspective, she ignored the testimony of Respondent's witnesses (including Viviana Ruana, who specifically testified about the employees' fear of Mr. Cisneros, and Maria Chavez who testified about Mr. Cisneros taking photographs of her prior to her testimony at the hearing), and gave weight to irrelevant evidence such as Respondent continuing to negotiate with Mr. Cisneros and ultimately signing a contract.

Under a workplace safety standard, the fear or absence of fear is a crucial determination and the ultimate issue. There was ample testimony from Respondent's witnesses regarding their fear of Mr. Cisneros and his intimidating behavior on the picket line. The ALJ erred when she discredited this testimony when using a Refusal to Bargain analysis. However, as justification for NeilMed's refusal of access to Mr. Cisneros, this testimony is persuasive and relevant.

Exception 2: Charged party excepts to the ALJ's finding that because NeilMed continued to negotiate with Mr. Cisneros after the picket line incident his presence did not create ill will and make good faith bargaining impossible.

The fact that NeilMed continued to negotiate with Mr. Cisneros after the picket line incident is immaterial as the negotiations did not take place at the facility, and Respondent's bargaining committee (two attorneys and a high level management employee) was not fearful of Mr. Cisneros. Those employees who are fearful of him are the rank and file employees in the bargaining unit who work in the facility and have no participation in the negotiations.

Further, it wasn't until after the negotiations had successfully concluded and a Collective Bargaining Agreement was signed that Mr. Cisneros attempted to access the facility under the guise

of being a Business Agent. Prior to that time, Respondent had no reason to refuse to negotiate with Mr. Cisneros, and importantly, Respondent never did. It was only when it appeared that he would have unfettered access within the plant to those employees who had been intimidated by him and were fearful of him, that Respondent prohibited entry pursuant to their duty to provide a safe work place to their employees. Had Mr. Cisneros attempted to access the manufacturing plant at the facility after his suspension and prior to December 2010, Respondent would have refused him entry at that time also. In fact, despite repeated requests from the Union to re-hire Mr. Cisneros, Respondent refused, citing Mr. Cisneros' picket line conduct and employee safety

In a "Refusal of Access" case, as this is, continued negotiations away from the premises is immaterial.

Exception 3: Charged party excepts to the ALJ's finding that because the Union and NeilMed signed the Collective Bargaining Agreement after the picket line incident Mr. Cisneros' presence did not create ill will and make good faith bargaining impossible.

The ALJ cites the fact that a collective bargaining agreement was eventually signed as evidence that Mr. Cisneros did not create such ill will that good faith bargaining was impossible. In a "Refusal of Access" case, this evidence is immaterial. What is material is the bargaining unit employees' fear of Mr. Cisneros and his intimidating behavior, as set forth in the testimony of Respondent's witnesses. One witness, Maria Chavez, even testified that Mr. Cisneros used his cell phone to take photographs of her and Respondent's other witnesses prior to them testifying at the hearing.

B. Taking Photographs was a Violation of the Sequestration Order

Exception 4: Charged party excepts to the ALJ's failure to find that Mr. Cisneros violated

the sequestration order when he took photographs of Respondent's witnesses while they were waiting to testify at the hearing.

Exception 5: Charged party excepts to the ALJ's erroneous finding that no further mention of Mr. Cisneros' taking photographs of Respondent's witnesses was made throughout the remainder of the hearing nor was any witness asked about the issue.

Exception 6: Charged party excepts to the ALJ's erroneous finding that the issue of Mr. Cisneros taking photographs was not litigated.

While the ALJ opinion finds no evidence of photographs taken by Mr. Cisneros, the transcript reveals that there was testimony regarding this issue prior to the ALJ finding no relevance. Maria Chavez testified that "when we came in, he took pictures of us with his cell phone." This testimony was never disputed by any other witness. While the ALJ may have offered the sequestration order as the only avenue available to Respondent to prevent typical interactions with Respondent's witnesses, it is clear that Respondent sought an order to prevent intimidation and coercion of witnesses. The transcript reflects the ALJ's refusal to even acknowledge that Mr. Cisneros' photographing of the women was intentional and reprehensible.

A union's unexplained photographing of employees has a tendency to intimidate employees. *Waco, Inc.*, 273 NLRB 746 (1984); *F.W. Woolworth,* 310 NLRB 1197 (1993). These two cited cases rest on the analysis that (1) during an election campaign, the employer may be displeased with employees who support the union; (2) the photographing and videotaping of employees engaged in such activity constitutes permanent record keeping, which is more than mere observation; and (3) employees could reasonably fear that the record of their activities could be used for future reprisals.

The ALJ opinion, page 7, line 25, indicates "No further mention of this situation was made

throughout the remainder of the hearing nor was any witness asked about this issue." Unfortunately, this is an obvious mistake in reading the transcript. The evidence was offered and should have been considered by the ALJ.

In the transcript of the hearing, the ALJ indicated that there wasn't much emphasis put on the facts of Mr. Cisneros taking photographs of Respondent's witnesses given that it "doesn't go to the action of prohibiting Mr. Cisneros from coming to the facility." This ignores Board authority under *Waco, Inc., 273* NLRB 746 (1984); *F.W. Woolworth,* 310 NLRB 1197 (1993) that Mr. Cisneros' actions were intimidating and coercive. Further, these facts absolutely support the employer's decision to refuse Mr. Cisneros access to the plant as Respondent's witnesses are now even more fearful of Mr. Cisneros then they were before.

Here, during a hearing and official proceedings, employees of Respondent testified on behalf of Respondent; in essence, against Mr. Cisneros and the union. The photographs taken by Mr. Cisneros reflect a permanent record of exactly which employees testified for Respondent. Lastly, these employees, who are mild-mannered Hispanic women, legitimately fear that the photographs taken by Mr. Cisneros could be used for future reprisals. During rebuttal testimony, the union and Mr. Cisneros offered no testimony regarding or rebutting the testimony that Mr. Cisneros had taken photographs of witnesses while the ladies were waiting to testify. There was no testimony regarding any legitimate or conceivable reasonable purpose for Mr. Cisneros to be taking photographs of Respondent's witnesses. For example, if the union wants to have a record of who testified for Respondent, the union can simply review the transcript. The only reasonable conclusion, is that Mr. Cisneros continues to feel the need to intimidate these employees, and he continued that intimidation by photographing the employees prior to their testimony. If Mr. Cisneros is so brazen in his

intimidation and fear inducing tactics during an official proceeding, then why should an employer trust him to interact with any propriety on the employer's premises?

Randell Warehouse of Arizona, 347 NLRB 591 (1999), referred to as *Randell II* is also instructive. In *Randell II,* the NLRB revisited the issue of a union photographing employees during protected activities. In *Randell II,* the Respondent alleged that the union was photographing employees during the dissemination of literature. The reasoning of *Randell II* is particularly helpful in analyzing Mr. Cisneros taking photos of the witnesses prior to them testifying. Just as employees are free to engage in activities which please or support the union, employees are also protected pursuant to Section 7 of the Act when the employees choose to act in a way that may not particularly please or empower the union. Here, Mr. Cisneros, the picket line captain for the union and now a business agent of the union, blatantly and openly photographed the witnesses who were waiting to testify on behalf of Respondent. Mr. Cisneros' actions were an improper interaction with witnesses and reprehensible and objectively seen as an act of intimidation toward the witnesses. Therefore, the reviewing court should find a violation of the sequestration order.

C. Respondent's Witnesses' Testimony Regarding their Fear of Mr. Cisneros Should be Credited.

Exception 7: The ALJ erred in failing to credit the testimony of the female employees regarding their fear for their safety.

Exception 8: Charged party excepts to the ALJ's finding that Maria Chavez's testimony that Mr. Cisneros told her "If I wasn't with them, something bad would happen to me" was too long a sentence to hear while passing pickets."

Exception 9: Charged party excepts to the ALJ's complete failure to consider the testimony

of the female employees who are fearful of Mr. Cisneros.

The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). The crucial question is not measuring credibility by virtue of merely an ostensible clear recollection of dates and days, but an evaluation, ultimately, of the credibility and veracity of a particular witness. The Board, with court approval, has taken into account, in establishing ultimate veracity, the inability of a truthful witness to remember particular dates, days, or even sequence of events. See *Plumbers Local 195 (Stone & Webster Engineering Corp.)*, 240 NLRB 504 (1979), enfd. 606 F.2d 320 (5th Cir. 1979).

Here, the women are consistent in their explanations and accounts of how Mr. Cisneros has intimidated them and made them fearful of him. The ALJ discredited Maria Chavez' testimony regarding the Cisneros statement, "If I wasn't with them, something bad would happen to me," as too long a sentence to hear while passing picketers. The ALJ found that picketers impeded or obstructed ingress to the facility. (Decision P. 4, line 3) If the picketers were impeding and obstructing the movement of vehicles to the facility, wouldn't it be true that the vehicles would be stopped or moving in a slow enough fashion so that Ms. Chavez cold have heard a ten word threat by Mr. Cisneros?

Even the DVD evidence shows how slowly vehicles had to proceed when crossing the picket line. The ALJ ignores common sense and the testimony of the female employees as well as the DVD evidence in concluding that the statement was impossible.

The ALJ's conclusions are incongruous. The female employees' testimony is accepted as

true when they testify that Mr. Cisneros shouted obscenities at them. The female employees testimony is accepted as true when they testify that Mr. Cisneros impeded ingress and egress. However, these same witnesses are disregarded when they testify that Mr. Cisneros hit vehicles with his picket sign, that he made verbal threats, and that they are afraid of him.

D. Mr. Cisneros' Lack of Unique Skills or Knowledge about the NeilMed Operations is Relevant.

Exception 10: Charged party excepts to the ALJ's complete failure to consider the evidence or address the issue that Mr. Cisneros possesses no skills or knowledge which justifies the Union's superseding need for him to enter the premises in order to fulfill his duties as business agent.

General Counsel's opening statement claimed that "the union selected [Elmer Cisneros] to represent employees because of his experience with the bargaining unit, their work, and their needs." (Tr. 9:21-25) Even after General Counsel made this claim in opening statements, Respondent was not allowed to cross-examine Mr. Cisneros regarding his familiarity with the bargaining unit work or the bargaining unit needs.

The controlling Federal Rules of Evidence regarding relevancy are Rules 401 and 402. *Federal Rule of Evidence 401* provides:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Federal Rule of Evidence 402 provides:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other

rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

For instance, "Rule 401 does not explicitly treat 'materiality' as a separate concept. Both traditional requirements of relevance analysis -- that evidence must relate to issues that are properly in dispute and that it must shed some light on those issues -- are combined into one rule. Whether an issue is properly in dispute is, of course, determined by the applicable substantive law." *Phillips v. Western Co. of N. Am.*, 953 F.2d 923 (5th Cir. 1992).

"In an action to enjoin union work stoppages violating parties' collective bargaining agreement (CBA) and for damages, where defendant union argued that evidence of union steward's threats of violence against employers' employees was not relevant evidence, evidence of steward's termination and union's reaction to termination was probative of true reason for work stoppages; this evidence was relevant to assist jury in determining whether work stoppages were breach of CBA." *Allied Sys. v Teamsters Auto. Transp. Chauffeurs, Demonstrators & Helpers, Local 604.* 304 F3d 785 (8th Cir. 2002).

After hearing a claim in opening statements that Mr. Cisneros has to be the union's chosen representative because of his experience and knowledge at Respondent's workplace, and after General Counsel had elicited testimony regarding Mr. Cisneros' work experience and the location of his work, Respondent was improperly denied the right to question Mr. Cisneros regarding his familiarity with new machines, new safety procedures, and changes at Respondent's manufacturing plant since his employment at the facility. Respondent was prevented from rebutting the statements made by General Counsel and the testimony offered by Mr. Cisneros.

During cross-examination at the hearing, Mr. Cisneros only briefly testified that he was not

familiar with the Marchessini machine prior to the line of questioning being stopped. Respondent relied on *King Soopers*, 338 NLRB 30 (2002) for the proposition that Mr. Cisneros has no unique qualifications that require that he is the union representative to enter the plant.[1] The relevant portion of *King Soopers* in which the Employer refused to deal at all with the Union's Business Agent, states, "Gonzales has no demonstrated expertise which would suggest that the Union's membership would not be as well served if he was assigned to service stores other than King Soopers." *Supra* at pg. 274.

Therefore, the testimony in the instant case should have been allowed to fully develop in this regard, and the ALJ erred.

E. The Appointment of Mr. Cisneros as Business Agent and the Attempts to Bring Him onto the Facility were Bad Faith Tactics Undertaken by the Union

Exception 11: Charged party excepts to the ALJ's refusal to consider that the appointment of Elmer Cisneros as business agent was bad faith on the part of the union.

"Under unusual circumstances, a union may, by contemporaneous action in connection with bargaining, afford an employer grounds for refusing to bargain so long as that conduct continues. This is so because it cannot be determined whether or not an employer is wanting in good faith where measurement of this critical standard is precluded by an absence of fair dealing on the part of the employees' bargaining representative. We believe that the Union exhibited just such a lack of fair

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[1]Respondent made an offer of proof that since Mr. Cisneros had been terminated, Respondent had purchased new machines and instituted new safety programs and procedures. The testimony would have shown that Mr. Cisneros does not have any type of specialized knowledge of the facility. The offer of proof was rejected.

dealing here..." *Phelps Dodge Copper Products Corporation* 101 NLRB 360, 368 (1952). (See also *NLRB vs. ILGWU* (1960) 274 F. 2d 376, 379, the court ultimately concluded, "the Association clearly displayed an absence of fair dealing, in selecting and insisting upon Mickus as its bargaining representative, and thus that its offer to bargain was not made in good faith.")

The Union is clearly displaying an absence of fair dealing in selecting and insisting upon Mr. Cisneros to enforce their contractual right of access to the facility. When bargaining for this "right of access" provision in the CBA, NeilMed expected and is entitled to good faith on the part of the Union. Instead, the Union showed a complete lack of good faith by expecting a former employee who had been terminated for workplace violence, and whom NeilMed refused to rehire despite repeated requests from the Union, to be permitted access to the facility under the guise of being a Union representative.

Further evidence of the Union's lack of good faith is Mr. Cisneros taking photographs of Respondent's witnesses who are members of the bargaining unit prior to their testimony. This intimidation was clearly designed to deprive those employees of their rights to be free from union coercion.

In *Bausch & Lomb Optical Company* 108 NLRB 1555, 1558 (1954), the Board cited the U.S. Supreme Court: "in performing its statutory function the Board has discretion to place appropriate limitations on the choice of bargaining representatives should it find that public or statutory policies so dictate." (See *NLRB v. Jones & Laughlin Steel Corp.* (1947) 331 US 416 "Freedom to choose, in this statutory setting, must mean complete freedom to choose any qualified representative unless limited by a valid contrary policy adopted by the Board.")

NeilMed's refusal to permit access to Mr. Cisneros is based on employees' fear, his prior violent and unprovoked behavior towards his co-workers, and his subsequent termination for that behavior. The Board has discretion to limit the Union's choice of Elmer Cisneros based on public and statutory policies. The public and statutory policy prohibiting workplace violence are important enough to respect NeilMed's decision not to permit Mr. Cisneros on their premises.

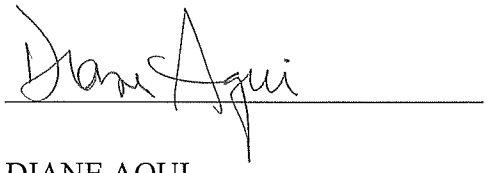
IV

CONCLUSION

Based on the foregoing exceptions and legal analysis, Respondent requests that the Board grant the exceptions, overturn the ALJ's Decision, and find for Respondent.

Respectfully Submitted,

Date: August 29, 2011



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PROOF OF SERVICE

I declare as follows:

I am over the age of 18 years and not a party to the within action. My business address is 1120 College Avenue, Santa Rosa, CA 95404-4020.

I am readily familiar with the business practice of this office for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service on the same day in the ordinary course of business.

On the date below, I served the attached documents described as:

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS

on the interested parties in said cause, as follows:

__ By Regular U.S. Mail. The documents were placed for collection and mailing, following ordinary business practice for deposit in the United States Postal Service, in a sealed envelope, with the postage thereon fully prepaid, addressed as stated on the attached service list.

__ By Facsimile or Telecopier, with original to follow by U.S. Mail, Express Mail, or other overnight courier as applicable, to all parties as stated on the attached service list.

__ By Personal Service. I caused each such envelope to be delivered by hand to the addressee(s) as stated on the attached service list.

Ralph Miranda
Teamsters Local 624
1371 Neotomas Avenue
Santa Rosa, CA 95405

Teague Paterson
Beeson, Tayer & Bodine
1404 Franklin Street, Fifth Floor
Oakland, CA 94612-3208

Carmen Leon
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 8/29/11 at Santa Rosa, California.

Diane Aqui